Supreme Court, U.S.
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NO. 85-1878 (2)

IN THE

Supreme Court Of The United States

October Term, 1985

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY; BOARD OF TRUSTEES OF ALABAMA A&M UNIVERSITY; JOHN KNIGHT, *et al.*; and NORMALITE ASSOCIATION, *et al.*,
Petitioners

v.

AUBURN UNIVERSITY; BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA; TROY STATE UNIVERSITY; ALABAMA STATE BOARD OF EDUCATION; and GEORGE WALLACE, GOVERNOR OF ALABAMA
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION SUBMITTED BY RESPONDENT, TROY STATE UNIVERSITY

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QUESTIONS PRESENTED

The respondent, Troy State University, adopts by reference the Questions Presented framed by respondents, The Board of Trustees for the University of Alabama and Auburn University.

PARTIES

The respondent, Troy State University, adopts by reference the listing of parties by respondents, The Board of Trustees for the University of Alabama and Auburn University.

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INFORMATION REQUIRED BY RULE 28.1

Troy State University, respondent herein, is a public corporation created pursuant to Alabama Code, 1975, §§ 16-56-1 through 16-56-15. As a public corporation, Troy State University has no subsidiaries and is the subsidiary of no other corporation.

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STATEMENT OF THE CASE

The respondent, Troy State University, adopts by reference the Statement of the Case filed by respondents, The Board of Trustees for the University of Alabama and Auburn University.

ARGUMENT

The petitioners have failed to show that this case, in its present posture, involves issues of such extraordinary national significance that review before judgment in the court of appeals is justified. Sup.Ct. Rule 18. Neither have the petitioners shown any "special and important" reasons for the issuance of a writ of certiorari. Sup.Ct. Rule 17. The orders entered by the court of appeals are legally sound and are not in conflict with any decision of another federal court of appeals or any decision of this Court. The orders entered by the court of appeals simply do not present any issues warranting consideration by this Court at this stage of the proceedings.

I. This Case in Its Present Posture Does Not Present a National Emergency or Other Extraordinary Circumstance Justifying Review Before Judgment in the Court of Appeals.

While this Court has authority to issue a writ of certiorari prior to judgment in the court of appeals, 28 U.S.C. §§ 1254 (1), 2101 (e), this power has been exercised only in national emergencies or other extraordinary circumstances. Sup.Ct. Rule 18. Certiorari before judgment has been granted in cases of great constitutional significance, such as the constitutional issues raised by New Deal enactments having a pervasive effect upon the operation of the national economy. *Carter v. Carter Coal Company,* 298 U.S. 238 (1936) (constitutionality of Bituminous Coal Conservation Act of 1935); *Rickert Rice Mills v. Fontenot,* 297 U.S. 110 (1936) (constitutionality of Agricultural Adjustment Act of 1933, as amended); *Railroad Retirement Board v. Alton Rail Company,* 295 U.S. 330 (1935) (constitutionality of Railroad Retirement Act); *Norman v. Baltimore & O.R. Co.,* 294 U.S. 240 (1935) (validity of Joint Resolution of Congress respecting "gold clauses" in private contracts for payment of money). Aside from questions of great constitutional import, review on certiorari before judgment below has been limited to cases involving the scope of Executive authority,

United States v. Nixon, 418 U.S. 683 (1974) (directing the President to produce tape recordings and documents relating to conversations with aides and advisors for use in pending criminal prosecution), national emergencies, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952) (constitutionality of Executive Order of President directing seizure of most of nation's steel mills), international jurisdictional disputes, *Wilson v. Girard,* 354 U.S. 524 (1957) (effect of administrative agreement pursuant to Treaty between United States and Japan), or wartime exigencies, *Ex parte Quirin,* 317 U.S. 1 (1942) (detention of German saboteurs for trial before Military Commission). On occasion, the Court has issued a writ prior to judgment below when identical or similar issues of constitutional import were pending before the Court in another case. *Taylor v. McElroy,* 360 U.S. 709 (1959).

In this case, none of the considerations which have historically been present upon issuance of a writ of certiorari before rendition of judgment in the court of appeals are presented. While important, this case in its present posture presents no issues arising from a national emergency and no issues of extraordinary constitutional significance requiring immediate review. There exists no imminent threat of harm to the petitioners and, within the knowledge of this respondent, there are no other cases pending in this Court presenting issues similar or identical to the substantive issues pending in this case in the court of appeals. In sum, this case simply does not present issues of the nature justifying certiorari before judgment below. This, in itself, is a sufficient basis for denial of the petition.

II. Jurisdiction is Proper in the Court of Appeals, Because the District Court Decision Contains Sufficient Indicia of Finality to Support an Appeal Under 28 U.S.C. § 1291.

Since the decision of the district court is final, determining everything except the details of implementation, the propriety of jurisdiction in the court of appeals is clear. The orders en-

tered in the court of appeals, which the petitioners seek to have reviewed on certiorari, are not, moreover, in conflict with decisions of this Court or with other courts of appeal. Sup.Ct. Rule 17.

The decision of the district court from which Troy State University and the other respondents have perfected appeals goes far beyond a mere finding of liability, as the petitioners would have it. The district court determined that the State of Alabama operated a dual system of higher education, that the dual system persists in certain respects, and that its vestiges have not been eliminated. Among a series of specific findings, the district court determined that at least fifteen programs offered by Troy State University at Montgomery unnecessarily duplicate program offerings at Alabama State University, with an equal or greater number of duplicative programs at the graduate level. The district court decision, in fact, determines everything, aside from the details of implementation of a remedial plan.

Moreover, by directing that four of the defendants, the State of Alabama, the Governor, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority, devise a plan for elimination of the vestiges which it found, and by restricting the involvement of Troy State University and the others to the privilege of comment on the plan, the district court has, in essence, terminated the participation of Troy State in the litigation as a matter of right. As with the other two institutional respondents, the district court, in assigning development of a plan to other defendants and restricting the rights of respondents to commentary, has ignored the statutory provisions which vest management of Troy State University in its Board of Trustees, Alabama Code, 1975, § 16-56-6, and has ignored decisions of this Court. *Milliken v. Bradley*, 418 U.S. 717 (1974); *Brown v. Board of Education*, 394 U.S. 294 (1955). The submission of the plan is, in actuality, little more than an administrative or ministerial act which, even if minimal flexibility remains, clearly has sufficient indicia of finality to support an appeal pursuant to 28 U.S.C.

§ 1291. *See, Brown Shoe Co., Inc. v. United States,* 370 U.S. 294 (1962); *Morales v. Turman,* 535 F.2d 864 (5th Cir. 1976), *rev'd on other grounds,* 430 U.S. 322 (1977); *Mahaley v. Cuyahoga Metropolitan Housing Authority,* 500 F.2d 1087 (6th Cir. 1974), *cert. den.,* 419 U.S. 1108 (1975); *Thoms v. Heffernan,* 473 F.2d 478 (2nd Cir. 1973), *vacated on other grounds,* 418 U.S. 908 (1974).

III. Jurisdiction is Proper in the Court of Appeals, Because the District Court Decision Constitutes an Interlocutory and Mandatory Injunction Appealable Under 28 U.S.C. § 1292(a)(1).

Even were the district court decision not an appealable final order under 28 U.S.C. § 1291, the decision rises to the level of an interlocutory and mandatory injunction appealable under 28 U.S.C. § 1292(a)(1) by specifying that the remedial plan eliminate all vestiges of the prior dual system of higher education in Alabama, in conformity with the specific findings entered by the district court. *Board of Public Instruction v. Braxton,* 326 F.2d 616 (5th Cir. 1964); *see also, Morales v. Turman,* 535 F.2d 864, 867, n. 6 (5th Cir. 1976), *rev'd on other grounds,* 430 U.S. 322 (1977). This affords a further basis for appellate jurisdiction and raises no conflicts with decisions of this Court or other courts of appeals. *Compare, Spates v. Manson,* 619 F.2d 204, 208 (2nd Cir. 1980); *Frederick L. v. Thomas,* 557 F.2d 373, 380-81 (3rd Cir. 1977); *Hoots v. Commonwealth,* 587 F.2d 1340, 1349 (3rd Cir. 1978); *United States v. Western Electric,* 777 F.2d 23, 28 (D.C. Cir. 1985) (distinguishing *Morales* on the basis that, unlike this case, the order appealed from disposed of no issues in the case and failed to demonstrate "that the district court has made up its mind"). For these additional reasons, the orders entered by the court of appeals do not present special and important reasons for which a writ of certiorari should issue. Sup.Ct. Rule 17.

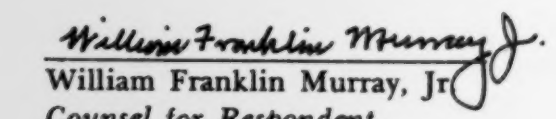
IV. The Entry of a Stay of District Court Proceedings is Proper.

The orders entered by the court of appeals staying further proceedings in the district court are clearly warranted. The decision of the district court threatens irreparable harm to Troy State University and the other respondents by requiring a major alteration of academic programs and policies with consequent impact on student and faculty recruitment, as well as other academic areas. The petitioners have failed even to advance the argument that they are likely to prevail on the merits. Moreover, neither the plaintiffs nor the public interest will be harmed by preservation of the *status quo* pending appeal. The only injury claimed by the petitioners is the simple fact that this is a "school desegregation case" in which, they assert, stays are never appropriate. Stays have, however, been upheld by this Court in school desegregation cases in which, like these proceedings, the balance of equities favored entry of a stay. *Corpus Christi School District v. Cisneros,* 404 U.S. 1211 (1971); *Columbus Board of Education v. Penick,* 439 U.S. 1348 (1978). The orders entered by the court of appeals staying further proceedings in the district court pending appeal simply do not constitute special and important reasons for which a writ of certiorari should issue. Sup.Ct. Rule 17.

CONCLUSION

This case, in its present posture, does not involve issues of such extraordinary national significance that immediate review is required before judgment in the court of appeals. Furthermore, the orders entered below are not in conflict with any decision of another federal court of appeals or any decision of this Court, and do not otherwise present any "special and important reason" for the issuance of a writ of certiorari. Accordingly, the petition should be denied.

Respectfully submitted,



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